

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
TO CHANGE APPROPRIATION WATER)	
RIGHT V(W)122539-43B BY MONTANA)	FINAL ORDER
DEPARTMENT OF FISH, WILDLIFE)	
AND PARKS)	

* * * * *

The Proposal for Decision (Proposal) in this matter was entered on March 13, 1995. Objector filed timely exceptions to the Proposal but did not request an oral argument hearing.

The Proposal recommended granting an authorization to change appropriation water right to Montana Department of Fish, Wildlife and Parks to lease and temporarily change, for a period of ten years, the following water rights: Statements of Claim 43B-W122539, 43B-W122540, 43B-W122541, 43B-W122542, 43B-W122544, 43B-W122547, and 43B-W122548, all appurtenant to the OTO Ranch owned by the United States Department of Agriculture, Forest Service (USFS).

The purpose of use claimed in the above water rights would be changed to instream flow to enhance the flow of Cedar Creek, improving conditions for the spawning and rearing of Yellowstone cutthroat trout. The point of diversion and place of use would be Cedar Creek from the headgate in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 13, in Township 8 South, Range 7 East, Park County, Montana, to its confluence with the Yellowstone River in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of said Section 13.

CASE # 122539

FILMED

Objector asserts that the Hearing Examiner made erroneous conclusions of law by failing to adequately assess the limited nature of Applicant's data, that there were no baseline data from which she could conclude the proposed appropriation would not harm downstream users' water rights.

Objector further complains that the Hearing Examiner failed to take into account the testimony of David DePuy concerning return flows.

Applicant presented sufficient uncontroverted evidence concerning the flow of Cedar Creek from 1973 to 1994 by testimony and exhibits to allow a finding of no adverse effect to downstream users' water rights. All evidence indicates the same amount or more water available for appropriation as a result of the proposed change.

Although she did not include DePuy's name in the list of persons presenting testimony concerning return flows, the Hearing Examiner considered the testimony of all persons regarding such flows and concluded there would be more water available for Objector's appropriation not necessarily by return flows, but by the amount of water left in the stream as a result of the proposed change. See Finding of Fact 11.

Finally, Objector takes the position that if an authorization to change appropriation water right is granted, it should be temporarily granted for a three to five year period of experimentation to determine the effects of leasing on the other decreed rights out of Cedar Creek.

There is nothing in the record to indicate a shorter lease period is warranted or necessary.

On April 3, 1995, the Department received a Request for Change in Monitoring Requirements from Applicant which was not an exception to the Proposal issued March 13, 1995, but a request to change the monitoring requirements set forth in the Proposal. Applicant also pointed out a clerical error in the land descriptions on pages 4 and 10 where "Range 8 East" should read "Range 7 East."

Subsequently, the Department received objections to that request from Objectors Franklin Rigler and Royal Teton Ltd/Church Universal and Triumphant, Inc. (Royal Teton Ranch). On May 23, 1995, the record in the matter was reopened to hear additional evidence concerning Applicant's request. The Proposal for Decision on Request for Change in Monitoring Requirements was issued on June 21, 1995, proposing to grant the request to install a weir as a measuring device on the Simonson Ditch instead of a flume. No timely exceptions to that Proposal were received by the Department; therefore, the Department accepts and adopts the Findings of Fact and Conclusions of Law as contained in the Proposal for Decision on the Request for Change in Monitoring Requirements, and incorporates them herein by reference. Finding of Fact 10 of the Proposal for Decision, issued March 13, 1995, is modified as follows:

10. Two of the four downstream diversions have Parshall flumes. For the other two diversions, Applicant will install a flume in the Rust Ditch and a weir in the Simonson Ditch or other adequate measuring

devices if the flume or weir is not technically possible. Applicant would also, through the United States Geologic Service (USGS), install two additional gauges. One gauge would be on the OTO Ranch and the other would be located at or near the uppermost of the four downstream diversions to monitor the accretion of water occurring between the OTO Ranch and the head of the four diversions. This would provide a measurement of the water entering that area so the appropriators using the four diversions would know how much water was available for diversion. Applicant anticipates the individual who now informally handles the distribution and administration of the rights on Cedar Creek would also read the gauges in this portion of Cedar Creek. The gauges on the OTO Ranch would be available to read any time anybody is in the vicinity. Applicant can arrange to have the USFS read the gauges on the OTO Ranch periodically. The USGS would perform a rating on the new gauges and make a rating table available to convert the gauge reading to cubic feet per second. (Testimony of Fred Nelson and Department file.)

Having given the exception to the original Proposal for Decision, issued March 13, 1995, full consideration, the Department of Natural Resources and Conservation adopts the Findings of Fact and Conclusions of Law as contained in the Proposal for Decision for this Final Order with the exception of correcting the land description error and modifying Finding of Fact 10 as stated above. Based upon the Findings of Fact and Conclusions of Law, the Department of Natural Resources and Conservation makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations listed below Authorization to Change Appropriation Water Right V(W)122539-43B is granted to Montana Department of Fish, Wildlife and Parks to lease and temporarily change, for a period of ten years, the following water rights: Statements of

Claim 43B-W122539, 43B-W122540, 43B-W122541, 43B-W122542, 43B-W122544, 43B-W122547, and 43B-W122548, all appurtenant to the OTO Ranch owned by the United States Department of Agriculture, Forest Service (USFS).

The purpose of use claimed in the above water rights will be changed to instream flow to enhance the flow of Cedar Creek, improving conditions for the spawning and rearing of Yellowstone cutthroat trout. The point of diversion and place of use would be Cedar Creek from the headgate in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 13, in Township 8 South, Range 7 East, Park County, Montana, to its confluence with the Yellowstone River in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of said Section 13.

A. The approval of this change in no way is to be construed as recognition by the Department of the water rights involved. All rights are subject to possible modification under the proceedings pursuant to Title 85, Chapter 2, Part 2 MCA, and 85-2-404, MCA.

B. Appropriator shall install a weir on the Simonson Ditch and a flume on the Rust ditch or other adequate measuring devices if the flume or weir is not technically feasible, to upgrade the existing measuring devices.

C. Appropriator shall, through a contract with the USGS, install and maintain staff gauges on Cedar Creek at three sites:

- 1) at or very near the highway crossing to monitor the delivery of the leased flow of 1.3 cubic feet per second;

2) at or near the uppermost diversion (Tostovernick Ditch); and

3) at or near the OTO buildings.

D. The water rights changed by this authorization are subject to the authority of the court appointed water commissioners, if and when appointed, to admeasure and distribute to the parties using water in the source of supply the water to which they are entitled. The Appropriator shall pay his proportionate share of the fees and compensation and expenses, as fixed by the district court, incurred in the distribution of the waters.

The Appropriator shall keep written records of the flow rate recorded bi-monthly and shall submit said records by November 30 of each year and/or upon request to the Water Resources Regional Office, 601 Nickles, Suite 2, Bozeman, MT 59715 PH: (406) 586-3136.

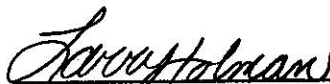
NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural

Resources and Conservation for the ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape of the oral proceedings to the district court.

Dated this 9th day of August, 1995.



Larry Holman, Chief
Water Rights Bureau
Department of Natural Resources
and Conservation
Water Resources Division
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6631

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record, first class mail, at their address or addresses this 15th day of August, 1995, as follows:

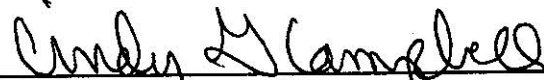
Robert Lane & Fred Nelson
Montana Dept. Fish,
Wildlife & Parks
1420 E. 6th Ave.
Helena, MT 59620

Royal Teton, Ltd.
Edward L. Francis, President
558 Old Yellowstone Trail S.
Corwin Springs, MT 59030

Franklin J. Rigler
P.O. Box 970
Gardiner, MT 59030

Scott Compton, Manager
Bozeman Water Resources
Regional Office
601 Nickles, Suite 2
Bozeman, MT 59715
(via electronic mail)

Karl Knuchel, Attorney
P.O. Box 953
Livingston, MT 59047



Cindy G. Campbell
Hearings Unit Legal Secretary

CASE # 122539

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	PROPOSAL FOR
TO CHANGE APPROPRIATION WATER)	DECISION ON
RIGHT V(W)122539-43B BY MONTANA)	REQUEST FOR CHANGE
DEPARTMENT OF FISH, WILDLIFE)	IN MONITORING
AND PARKS)	REQUIREMENTS

* * * * *

On April 3, 1995, the Department of Natural Resources and Conservation (Department) received a request from Montana Department of Fish, Wildlife and Parks (Applicant or MDFWP) to change the monitoring requirements set forth in the Proposal for Decision issued March 13, 1995. Subsequently, the Department received objections to that request from Objectors Franklin Rigler and Royal Teton Ltd/Church Universal and Triumphant, Inc. (Royal Teton Ranch). Mr. Rigler filed an objection to the proposed change in measuring devices on the basis that a weir cannot be properly monitored with the precision of a Parshall flume and that he was not given the opportunity to cross-examine Applicant's expert relative to the use of a weir versus the use of a Parshall flume. Royal Teton Ranch filed an objection to the request on the basis that a weir is an inherently inaccurate and inadequate measuring device and is subject to measuring discrepancies and disagreements. Further, it argues, placing a weir at this diversion will not resolve the kinds of discrepancies and disagreements which have occurred between water users and which can be expected to occur in the future. Royal Teton Ranch believes, among other things, a weir does not address

CASE # 122539

FILED

the problem which gave rise to the requirement that Applicant install Parshall flumes at all diversions currently lacking them. Royal Teton Ranch also believes the area could be engineered to allow installation of a Parshall flume.

On Tuesday, May 23, 1995, the record in the matter was reopened to hear additional information concerning Applicant's request.

APPEARANCES

Appearing for Applicant were: Robert N. Lane, counsel for Applicant; Fred Nelson, Fisheries Biologist with MDFWP; Dale Miller, Hydrologist and principal of Inter-Fluve, Inc.; and Liter Spence, Water Resources Supervisor with MDFWP.

Appearing for Objectors were: Franklin Rigler and his counsel, Karl Knuchel; Edward L. Francis, President of Royal Teton Ranch; and Edwin Johnson, an employee of Royal Teton Ranch and irrigator in the area.

EXHIBITS

Applicant offered one exhibit for inclusion in the record. Objectors Rigler and Royal Teton Ranch objected to this exhibit on the basis of no foundation, that Applicant's witness has not been on site, all he did was review the text, and that he is not qualified to testify on the actual facts used to prepare the document. Objector Rigler had a continuing objection to Mr. Miller testifying during the hearing. The Hearings Examiner reserved a ruling on the objections and the acceptance of this exhibit until her proposal for decision on the Request for Change

in Monitoring Requirements (Request). Mr. Rigler also objected to the letter attached to Applicant's Request for Change in Monitoring requirements based on lack of foundation and the fact that the author of the letter was not present at the hearing and was not available for cross-examination.

The scope of this hearing was limited to evidence concerning measuring devices to be placed in the Simonson and Rust ditches. That in itself is foundation for Applicant's Exhibit 1 which discusses the designs and construction of the proposed flumes and weirs as well as the letter attached to Applicant's Request. Although Applicant's witness has not been on the site of the proposed measuring device, he is, by his education and position in the consulting firm, qualified to testify on such matters as flumes and weirs. He is able to determine topography of an area from the field work performed by his colleagues and by discussions with those persons in staff meetings. It was during such a meeting, Mr. Miller suggested that due to the steep topography, a weir should be used instead of a Parshall flume in the Simonson ditch. Applicant's Exhibit 1 sets forth the specifications of the measuring devices, a flume for the Rust ditch and a weir for the Simonson ditch, as well as the installation procedures for each device.

Objector Rigler had, in his objection to amendment of application, complained that he did not have the opportunity to cross-examine Applicant's expert witness. It is true, Dale Miller did not author the letter enclosed with Applicant's

Request. However, Mr. Miller is an expert in his own right and as supervisor of the person who wrote the letter, is well qualified to represent the person who wrote the letter. For the reasons stated above, the objections to the exhibit are overruled as is the continuing objection by Objector Rigler to the testimony of Mr. Miller from this document. Applicant's Exhibit 1 is accepted into the record.

Applicant's Exhibit 1 consists of eight pages and is a document entitled "Construction and Installation Specifications for Flow Measuring Devices in Cedar Creek" prepared by Inter-Fluve, Inc. The first page is a cover page. The next four pages contain specifications, recommendations, and discussions for the measuring devices to be located in the Simonson and Rust ditches. The last three pages contain drawings of a weir box - profile view, a weir box - plan view, and bulkhead/weir specifications.

Each Objector offered one exhibit for the record. Applicant objected to Objector Rigler's exhibit on the basis of irrelevance. A ruling on the objection was reserved until the decision was made on Applicant's request.

The Hearing Examiner is hard pressed to find relevance in this exhibit. It merely shows that Objector Rigler filed suit against several water users on Cedar Creek and that on September 20, 1977, Judge Shanstrom ordered that each of the parties to this "action shall install accurate measuring devices at or near the head of their respective ditches where they tap said stream (or any main ditch) and that the said measuring devices be

perpetually maintained and kept in repair by the owner or owners thereof." The order does not specify a certain type of measuring device and testimony at this reopening of the record hearing was that the order was never carried out. The only relevance of this exhibit, and it is very thin relevance, is to show there has been and continues to be controversy concerning the measuring device, or lack thereof, in the Simonson ditch. On that basis, this exhibit is accepted into the record for that very narrow interpretation.

Objector Rigler's Exhibit A consists of two pages of the decree in Cause 13255, *Rigler v. Abbie, etal.* (1977), pages 1 and 25.

Applicant had no objection to Royal Teton Ranch's exhibit.

Objector Royal Teton Ranch's Exhibit 1 is a single page containing a petition dated July 2, 1987, to Judge Bryon Robb signed by five water users of Cedar Creek complaining that there were no legal measuring devices in the Simonson and Rust ditches.

The Hearing Examiner, having reviewed the record and being fully advised in the premises, does hereby make the following:

FINDINGS OF FACT

1. Objectors have, in the past, had troublesome experiences with weirs. They described various typical problems with improperly installed weirs, e.g., the weir was not perpendicular in the stream or the weir could be tampered with resulting in erroneous measurements. More importantly no one really knew how to take a measurement with a weir and no one has confidence in a

reading taken at a weir. (Testimony of Edwin Johnson, Edward L. Francis, and Franklin Rigler.)

2. Mr. Rigler has experience with both flumes and weirs. His current measuring devices are Parshall flumes, installed in 1972. Those flumes are still level and readings on these flumes result in accurate flow measurements. Mr. Rigler has, in the past, used weirs on other land parcels. He could not get the water slowed down enough to get an accurate measurement from the weirs. Those weirs were built by Mr. Rigler's father by designs from the Soil Conservation Office. They were too short and they "moved more in the stream" than the Parshall flumes.

There has been, in the past, a flume in the Simonson ditch. That flume was removed in the 1950's when the cement headgate was broken and the wooden divider box was installed. (Testimony of Franklin Rigler and Ed Johnson.)

3. The Simonson ditch has a high-water flow of from 1500 to 2000 miner's inches. When the water is extremely high, the weir plate could be removed to allow the high water to flow unimpeded down the Simonson ditch. (Testimony of Dale Miller and Franklin Rigler.)

4. Royal Teton Ranch withdrew it's objection to this application on the condition that, among other things, flumes would be installed in the Simonson and Rust ditches. Its initial objection to the application was based upon the lack of flow metering devices which would result in an unmanageable system for the allocation of water. Because of the competing uses for the

water and the number of ditches involved, Royal Teton Ranch believes the lack of an adequate measuring device would make Applicant's monitoring plan unadministerable. It is no accident that Royal Teton Ranch agreed to the installation of Parshall flumes as a condition to its withdrawal of objection to the application. Parshall flumes have been discussed repeatedly on the various Cedar Creek ditches. Irrigators have petitioned the district court for an order requiring the installation of a Parshall flume. The water users in the area are confident that a reading taken from a Parshall flume is correct. There is no such confidence in a weir. (Testimony of Edward Francis and Royal Teton Ranch's Exhibit 1.)

5. Installed properly and read properly, a Parshall flume is accurate within two or three percent. Flumes are typically installed in sites with relatively low gradient (less than approximately 0.5 foot slope in 100 feet) largely because of the hydraulics required as water flows into and out of the flume to get an accurate measurement. Given the slope of about five percent plus the amount of grade taken up by the dividing box in the stream, something on the order of 20 to 30 feet of relatively flat ditch channel in the Simonson ditch would be needed to create appropriate site conditions to put in a flume. To accomplish that one would need to either excavate back upslope and take up that grade in a short reach or build the slope up to try and create a flat grade. Because the ditch banks are not that high, the first alternative would be required and coming out

of the diversion box, one would need to build some sort of grade control that would take up anywhere from 2.5 to 4.0 feet of drop over a very short distance. That is a relatively unstable situation. Grade control could consist of a series of large rocks or a wooden or concrete structure, ranging in cost from \$2,000 to \$10,000 depending on the materials used. The cost of the flume only could be approximately \$1500. A steel flume would last approximately 30 years.

6. A weir would better suit the topography at the head of the Simonson ditch for measuring water. Primarily weirs function by water passing through a known size with known hydraulic characteristics and are used to measure the amount of water passing through that point. The primary component of a weir is that water flows over a crest unimpeded and to do that, it needs a break in slope of 0.5 foot or more. In this particular case, there are a few feet of grade break and it would be appropriate to take that break up as water flowing over the weir crest unimpeded. A weir of the design submitted with Applicant's Exhibit 1 would be installed so that it would be as easy to read and as accurate as a Parshall flume. A weir of this design, properly installed, is tamper-proof. A grade control structure would not be necessary for the weir. The cost of the weir would be approximately \$2800. A weir would last approximately 20 years. (Testimony of Dale Miller and Applicant's Exhibit 1.)

Based upon the foregoing Findings of Fact and the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. Objectors have had unfortunate experiences with weirs or structures that were called weirs. See Findings of Fact 1, 2, and 4. Nevertheless, Applicant has proven by a preponderance of the evidence that a weir is the better measuring device for that location and that accurate measurements can be taken from the weir with ease comparable to taking a measurement from a Parshall flume. See Findings of Fact 3, 5, and 6.

Based upon the foregoing Findings of Fact and Conclusion of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

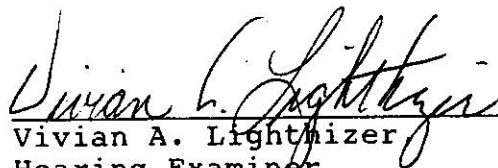
Department of Fish, Wildlife and Parks' request to install a weir as a measuring device on the Simonson ditch instead of a flume, as originally proposed, is granted.

NOTICE

This proposal may be adopted as a part of the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be limited to the narrow issue covered at the second evidentiary hearing and must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party. The responses must be filed within 20 days after service of the exception and copies must be sent to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 21st day of June, 1995.


Vivian A. Lightizer
Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6615

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision on Request for Change in Monitoring Requirements was duly served upon all parties of record, first class mail, at their address or addresses this 21st day of June, 1995, as follows:

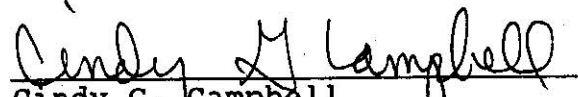
Robert Lane & Fred Nelson
Montana Dept. Fish,
Wildlife & Parks
1420 E. 6th Ave.
Helena, MT 59620

Royal Teton, Ltd.
Edward L. Francis, President
558 Old Yellowstone Trail S.
Corwin Springs, MT 59030

Franklin J. Rigler
P.O. Box 970
Gardiner, MT 59030

Karl Knuchel, Attorney
P.O. Box 953
Livingston, MT 59047

Scott Compton, Manager
Bozeman Water Resources
Regional Office
601 Nickles, Suite 2
Bozeman, MT 59715
(via electronic mail)


Cindy G. Campbell
Hearings Unit Legal Secretary

**BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA**

* * * * *

IN THE MATTER OF THE APPLICATION TO CHANGE APPROPRIATION WATER RIGHT V(W)122539-43B BY MONTANA DEPARTMENT OF FISH, WILDLIFE AND PARKS))))))	PROPOSAL FOR DECISION
--	----------------------------	--------------------------------------

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on January 20, 1995, in Gardiner, Montana, to determine whether Authorization to Change Appropriation Water Right V(W)122539-43B should be granted to Montana Department of Fish, Wildlife & Parks for the above-entitled application under the criteria set forth in Mont. Code Ann. § 85-2-402(2) and in accordance with § 85-2-436 (1993).

APPEARANCES

Applicant Montana Department of Fish, Wildlife & Parks (MDFWP) appeared at the hearing by and through counsel, Robert Lane.

Frederick A. Nelson, Fishery Biologist with MDFWP, appeared at the hearing as a witness for Applicant.

Liter Spence, Water Resources Supervisor with MDFWP, appeared at the hearing but did not testify.

Bill Bucher, Hydrologist with Huntingdon Engineering and Environmental, appeared at the hearing as a witness for Applicant.

CASE # 122539

Objector Franklin J. Rigler, owner of Slip and Slide Ranch, appeared at the hearing in person and by and through counsel, Karl Knuchel.

David DePuy, Attorney, appeared at the hearing as a witness for Objector.

Objector Royal Teton, Ltd, withdrew its objection subject to certain conditions and did not appear at the hearing.

Jan Mack, Water Resources Specialist with the Bozeman Water Resources Regional Office of the Department of Natural Resources and Conservation (Department), appeared at the hearing.

EXHIBITS

Applicant offered two exhibits for the record. Both were accepted without objection.

Applicant's Exhibit 1 consists of two pages. The first page is entitled, "1994 Flow Measurements Cedar Creek Drainage." The second page is a memorandum to the file from Fred Nelson stating the site, date and time, and the flow measurements taken August 24 and 25, 1994.

Applicant's Exhibit 2 consists of four pages and is a memorandum to Fred Nelson, DFW&P, from Bill Bucher of Huntingdon concerning return flows in Cedar Creek.

Objector offered two exhibits for the record. Both were accepted without objection.

Objector's Exhibit A is a photograph of a field in which deer are feeding.

Objector's Exhibit C is a copy of a page from the Park County Water Resources Survey book upon which Objector identified certain features.

The Department file was made available for review by all parties who expressed no objection to any part of it; therefore, the Department file is accepted into the record in its entirety.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

FINDINGS OF FACT

1. An application in the name of Montana Department of Fish, Wildlife and Parks signed by Frederick A. Nelson was duly filed with the Department on November 10, 1993. (Department file.)

2. Pertinent portions of the application were published in the *Livingston Enterprise*, a newspaper of general circulation in the area of the source, on June 15, 1994. Additionally the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the application.

The Department received two timely objections to the application and notified Applicant of these objections by a letter dated August 5, 1994. (Department file.)

3. Applicant proposes to lease and temporarily change, for a period of ten years, the following water rights: Statements of Claim 43B-W122539, 43B-W122540, 43B-122541, 43B-W122542, 43B-

W122544, 43B-W122547, and 43B-W122548, all appurtenant to the OTO Ranch owned by the United States Department of Agriculture, Forest Service (USFS).

The purpose of use for the above water rights would be changed from irrigation to instream flow to enhance the flow of Cedar Creek, improving conditions for the spawning and rearing of Yellowstone cutthroat trout. The place of use would be changed from approximately 178 acres in Sections 5, 7, and 8 to the lower 2,700 feet of Cedar Creek located in the NW $\frac{1}{4}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$, NE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$, Section 13, all in Township 8 South, Range 8 East, Park County, Montana.¹ The new place of use is downstream from the last four irrigation diversions on the creek. The points of diversion would be changed from the NE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ and NW $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ Section 9; SE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ Section 8; NW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ and SE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ Section 7, NE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ Section 5, and SW $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ Section 4, to the NW $\frac{1}{4}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$, NE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$, of said Section 13. (Testimony of Fred Nelson and Department file and records.)

4. Most of the cutthroat spawning on Cedar Creek occurs in this lower portion. In this reach of the stream, a flow rate of at least 1.3 cubic feet per second must be maintained for spawning, to prevent egg loss and provide rearing for fry. August is particularly critical because hatching normally occurs from the first week to mid August when dewatering is also most likely. (Testimony of Fred Nelson.)

¹Unless otherwise stated, all legal land descriptions in this Proposal are located in Township 8 South, Range 8 East, Park County, Montana.

5. The total claimed flow rate for the seven rights to be changed varies by time period. From May 1 to July 15, the claimed flow rate is 6.77 cubic feet per second; from July 16 to July 31, the claimed flow rate is 6.39 cubic feet per second; from August 1 to August 31, the claimed flow rate is 9.64 cubic feet per second; and from September 1 to October 15, the claimed flow rate is 6.39 cubic feet per second. (Testimony of Fred Nelson.)

6. Applicant does not intend to protect all the water leased. Only 1.3 cubic feet per second up to 433.3 acre-feet of water would be protected. Any flow above that would be available to the other users, including Objector. (Testimony of Fred Nelson and Department file.)

7. Applicant's consultant testified that consumptive use of the rights to be changed amounts to approximately 85 percent of the amounts diverted. Therefore, of the water instream that is available for the rights to be changed, only 85 percent could be protected instream under this change application. (Testimony of Bill Bucher, Applicant's Exhibit 2 and Department file.)

8. Applicant measured the flow of Cedar Creek on August 19 and 20, 1992 and again in August of 1994, a severe drought year. After accounting for use by senior rights and water consumed by the rights to be changed, 2.46 cubic feet per second and 2.16 cubic feet per second were available respectively in August of 1992 and August of 1994 for instream flow protection. These amounts exceed the 1.3 cubic feet per second that would be

protected instream by 1.16 cubic feet per second and .86 cubic feet per second. (Applicant's Exhibit 2, Department file, and testimony of Fred Nelson and Bill Bucher.)

9. Cedar Creek is a decreed stream. The seven rights proposed to be leased and changed by Applicant are the second, third, fifth, and seventh rights by priority. The eighth right by priority (43B-W122539) would be leased by Applicant during the month of August only. Applicant proposes to continue the informal water allocation already in effect among the Cedar Creek water users to deliver the water leased for instream use. If working within the existing system is not effective in insuring the delivery of the instream water and if a water commissioner is the only feasible way of insuring the delivery of the instream water, USFS and MDFWP would jointly petition the District Court for appointment of a water commissioner for the Cedar Creek drainage. (Department file and records and testimony of Fred Nelson.)

10. Two of the four downstream diversions have Parshall flumes installed. Applicant would install Parshall flumes in the other two. Applicant would also, through the United States Geologic Service (USGS), install two additional gauges. One gauge would be on the OTO Ranch and the other would be located at or near the uppermost of the four downstream diversions to monitor the accretion of water occurring between the OTO Ranch and the head of the four diversions. This would provide a measurement of the water entering that area so the appropriators

using the four diversions would know how much water was available for diversion. Applicant anticipates the individual who now informally handles the distribution and administration of the rights on Cedar Creek would also read the gauges in this portion of Cedar Creek. The gauges on the OTO Ranch would be available to read any time anybody is in the vicinity. Applicant can arrange to have the USFS read the gauges on the OTO Ranch periodically. The USGS would perform a rating on the new gauges and make a rating table available to convert the gauge reading to cubic feet per second. (Testimony of Fred Nelson and Department file.)

11. Objector has filed Statements of Claim 43B-W194242, 43B-W194243, 43B-W194244, all claiming water use from Cedar Creek. Statement of Claim 43B-W194242 claims the fourth right on Cedar Creek with a priority date of May 29, 1894. Objector claimed irrigation of 52.8 acres by this claim, but testified during the hearing that he irrigates 46 acres. Priority dates of 1971 and 1972 were claimed by the other two water rights claims. Objector fears loss of recharge waters would adversely affect his irrigation rights. In August when the water is short, Objector depends upon the return flows for his irrigation.

Although there would be less return flow in August, there would also be less diversions for Objector to compete with to obtain his water. The net result would actually make more water available. (Department file, Department records, Applicant's

Exhibit 2, and testimony of Franklin Rigler, Bill Bucher, and Fred Nelson.)

12. Applicant is the executive branch agency mandated by statute to provide for the protection, preservation, and propagation of all fish and wildlife and their habitat within the state. Applicant has authority to acquire waters for fish and wildlife habitat. (Department file.)

13. There are no planned uses or developments on Cedar Creek for which a permit has been issued. Applicant holds the only reservation granted by the Board of Natural Resources and Conservation on Cedar Creek. (Department file and records.)

14. No objections relative to water quality were filed against this application. (Department file.)

15. No construction of appropriation works is required for the proposed change. (Department file.)

16. The proposed change does not involve salvage water. (Department file.)

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all substantive procedural requirements of law or rule have been fulfilled; therefore, the matter was properly before the Hearing Examiner. See Findings of Fact 1 and 2.

2. The proposed use of water, enhancement of stream flow for fishery, is a beneficial use of water. See Findings of Fact 3 and 4.

3. Applicant has provided a preponderance of evidence that the water rights of a prior appropriator will not be adversely affected. See Findings of Fact 5 through 11.

4. Applicant is not required to prove the proposed means of diversion, construction, and operation of the appropriation works are adequate. See Finding of Fact 15.

5. Applicant has a possessory interest, or the written consent of the person who has the possessory interest, in the property where the water is to be put to beneficial use. See Finding of Fact 12.

6. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved. See Finding of Fact 13.

7. Applicant is not required to prove no adverse effect to water quality or the ability of a discharge permitholder to satisfy effluent limitations. See Finding of Fact 14.

8. Applicant is not required to prove water-saving methods that would salvage water. See Finding of Fact 16.

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations listed below Authorization to Change Appropriation Water Right V(W)122539-43B is granted to Montana Department of Fish, Wildlife and Parks to lease and temporarily change, for a period of ten years, the following water rights: Statements of Claim 43B-W122539, 43B-W122540, 43B-W122541, 43B-W122542, 43B-W122544, 43B-W122547, and 43B-W122548, all appurtenant to the OTO Ranch owned by the United States Department of Agriculture, Forest Service (USFS).

The purpose of use claimed in the above water rights will be changed to instream flow to enhance the flow of Cedar Creek, improving conditions for the spawning and rearing of Yellowstone cutthroat trout. The place of use will be that portion of Cedar Creek located in the NW $\frac{1}{4}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$, NE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$, Section 13, in Township 8 South, Range 8 East, Park County, Montana. The points of diversion would be changed to the NW $\frac{1}{4}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$, NE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$, of said Section 13.

A. The approval of this change in no way is to be construed as recognition by the Department of the water rights involved. All rights are subject to possible modification under the proceedings pursuant to Title 85, Chapter 2, Part 2 MCA, and 85-2-404, MCA.

B. Appropriator shall install flumes on the Simonson and Rust ditches to upgrade the existing measuring devices.

C. Appropriator shall, through a contract with the USGS, install and maintain staff gauges on Cedar Creek at three sites:

- 1) at or very near the highway crossing to monitor the delivery of the leased flow of 1.3 cubic feet per second;
- 2) at or near the uppermost diversion (Tostovernick Ditch); and
- 3) at or near the OTO buildings.

D. The water rights changed by this authorization are subject to the authority of the court appointed water commissioners, if and when appointed, to admeasure and distribute to the parties using water in the source of supply the water to which they are entitled. The Appropriator shall pay his proportionate share of the fees and compensation and expenses, as fixed by the district court, incurred in the distribution of the waters.

The Appropriator shall keep written records of the flow rate recorded bi-monthly and shall submit said records by November 30 of each year and/or upon request to the Water Resources Regional Office, 601 Nickles, Suite 2, Bozeman, MT 59715 PH: (406) 586-3136.

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must

be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party. The responses must be filed within 20 days after service of the exception and copies must be sent to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 13th day of March, 1995.

(signed)

Vivian A. Lighthizer,
Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6615

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 13th day of March, 1995, as follows:

Robert Lane & Fred Nelson
Montana Dept. Fish,
Wildlife & Parks
1420 E. 6th Ave.
Helena, MT 59620

Royal Teton, Ltd.
Edward L. Francis, President
558 Old Yellowstone Trail S.
Corwin Springs, MT 59030

Scott Compton, Manager
Bozeman Water Resources
Regional Office
601 Nickles, Suite 2
Bozeman, MT 59715
(via electronic mail)

Karl Knuchel, Attorney
P.O. Box 953
Livingston, MT 59047

Franklin J. Rigler
P.O. Box 970
Gardiner, MT 59030

(signed)
Cindy G. Campbell
Hearings Unit Legal Secretary